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SUPREME COURT OF THE UNITED STATES

Nos. 118 and 119.—October Term, 1910

THE UNITED STATES OF AMERICA, APPELLANT

V.

THE AMERICAN TOBACCO COMPANY AND OTHERS

OPINION OF THE COURT DELIVERED BY
MR. CHIEF JUSTICE WHITE

DISSENTING OPINION BY MR. JUSTICE HARLAN

DELIVERED MAY 29, 1911

WASHINGTON
GOVERNMENT PRINTING OFFICE
1911

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IN THE SENATE OF THE UNITED STATES,
June 1, 1911.

Ordered, That the opinion of the Supreme Court of the United States in the case of the American Tobacco Co. et al., appellants, *v.* The United States, with the dissenting opinion of Justice Harlan, be printed as a Senate document.

Attest:

CHARLES G. BENNETT, *Secretary.*

SUPREME COURT OF THE UNITED STATES.

Nos. 118 and 119.—October Term, 1910.

118 The United States of America, appellant, *v.* The American Tobacco Company and others. 119 The American Tobacco Company and others, appellants, *v.* The United States of America.	Appeals from the Circuit Court of the United States for the Southern District of New York.

[May 29, 1911.]

Mr. Chief Justice White delivered the opinion of the court:

This suit was commenced on July 19, 1907, by the United States, to prevent the continuance of alleged violations of the first and second sections of the antitrust act of July 2, 1890. The defendants were 29 individuals, named in the margin,[1] 65 American corporations, most of them created in the State of New Jersey, and 2 English corporations. For convenience of statement we classify the corporate defendants, exclusive of the 2 foreign ones, which we shall hereafter separately refer to, as follows: The American Tobacco Co., a New Jersey corporation, because of its dominant relation to the subject matter of the controversy as the primary defendant, 5 other New Jersey corporations (viz, American Snuff Co., American Cigar Co., American Stogie Co., MacAndrews & Forbes Co., and Conley Foil Co.), because of their relation to the controversy as the accessory, and the 59 other American corporations as the subsidiary defendants.

The ground of complaint against the American Tobacco Co. rested not alone upon the nature and character of that corporation and the

[1] James B. Duke, Caleb C. Dula, Percival S. Hill, George Arents, Paul Brown, Robert B. Dula, George A. Helme, Robert D. Lewis, Thomas J. Maloney, Oliver H. Payne, Thomas F. Ryan, Robert K. Smith, George W. Watts, George G. Allen, John B. Cobb, William R. Harris, William H. McAlister, Anthony N. Brady, Benjamin N. Duke, H. M. Hanna, Herbert D. Kingsbury, Pierre Lorillard, Rufus L. Patterson, Frank H. Ray, Grant B. Schley, Charles N. Strotz, Peter A. B. Widener, Welford C. Reed (now deceased), and Williamson W. Fuller.

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power which it exerted directly over the five accessory corporations and some of the subsidiary corporations by stock ownership in such corporations, but also upon the control which it exercised over the subsidiary companies by virtue of stock held in said companies by the accessory companies by stock ownership in which the American Tobacco Co. exerted its power of control. The accessory companies were impleaded either because of their nature and character or because of the power exerted over them through stock ownership by the American Tobacco Co. and also because of the power which they in turn exerted by stock ownership over the subsidiary corporations, and, finally, the subsidiary corporations were impleaded either because of their nature or because of the control to which they were subjected in and by virtue of the stock ownership above stated. We append in the margin a statement showing the stock control exercised by the principal defendant, the American Tobacco Co., over the five accessory corporations and also the authority which it directly exercised over certain of the subsidiary corporations, and a list showing the control exercised over the subsidiary corporations as a result of the stock ownership in the accessory corporations, they being in turn controlled, as we have said, by the principal defendant, the American Tobacco Co.[1]

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[1] Extent of control of American Tobacco Co. over the accessory corporations:

American Snuff Co. Of 120,000 shares of preferred stock owns 12,517 shares directly and 11,274 shares by reason of stock control of P. Lorillard Co., in all, 23,764 shares; of 110,017 shares of common stock owns 41,214 directly and 34,594 by reason of stock control of P. Lorillard Co., in all, 75,808 shares.

American Cigar Co. Of 100,000 shares of preferred stock owns 89,700 shares directly and 5,000 shares through control of American Snuff Co., in all, 94,700 shares; of 100,000 shares of common stock owns directly 77,451 shares.

American Stogie Co. Of 108,790 shares of common stock controls 73,072⅔ shares through stock interest in American Snuff Co. The American Stogie Co. owns all of the stock—12,500—of the Union American Cigar Co.—cigars and stogies.

MacAndrews & Forbes Co. Of 37,583 shares of preferred stock (no voting power) owns 7,500 shares; of 30,000 shares of common stock owns 21,129 shares directly and 983 shares through stock control of the R. J. Reynolds Co., in all, 22,112 shares.

The Conley Foil Co. Of 8,250 shares of stock, directly owns 4,950 shares.

The American Tobacco Co. By stock ownership is the owner outright of the following defendant companies: S. Anargyros (the S. Anargyros Co. owns all the capital stock, 10 shares, of the London Cigarette Co.); F. F. Adams Tobacco Co.; Blackwell's Durham Tobacco Co.; Crescent Cigar & Tobacco Co.; Day & Night Tobacco Co.; Luhrman & Wilbern Tobacco Co.; Nall & Williams Tobacco Co.; Nashville Tobacco Works; R. A. Patterson Tobacco Co.; Monopol Tobacco Works; Spalding & Merrick.

The American Tobacco Co. also has the stock interest indicated in the following defendant corporations:

British-American Tobacco Co. Owns 1,200,000 shares of 1,500,000 shares of preferred stock and 2,280,012 shares of 3,720,021 shares of common stock.

The Imperial Tobacco Co., etc. Owns 721,457 pounds sterling of 18,000,000 pounds sterling of stock.

The John Bollman Co. Of 2,000 shares of stock owns 1,020 shares.

F. R. Penn Tobacco Co. Of 1,503 shares of stock owns 1,002 shares (through Blackwell's Durham Tobacco Co.).

R. P. Richardson, jr., & Co. (Inc.). Owns 600 out of 1,000 shares of stock and $120,000 of $200,000 issue of bonds.

R. J. Reynolds Tobacco Co. Owns 50,000 out of 75,250 shares of stock.

Pinkerton Tobacco Co. Owns 775 out of 1,000 shares of stock.

Reynolds Tobacco Co. (of Bristol, Tenn.). Owns 1,449 shares out of 2,500 shares.

J. W. Carroll Tobacco Co. Owns 2,000 out of 3,000 shares.

P. Lorillard Co. Owns 15,813 out of 20,000 shares of preferred and all the common stock (30,000 shares).

Kentucky Tobacco Product Co. Owns 14 of 1,900 shares preferred and owns directly 5,264, and, through the American Cigar Co., 355 out of 8,100 shares of common stock. (The Kentucky Tobacco Product Co. owns all the capital stock, 100 shares, of the Kentucky Tobacco Extract Co.)

Porto Rican-American Tobacco Co. Owns directly 6,578, and, through the American Cigar Co., 6,576 of 19,984 shares of stock. (The Porto Rican-American Tobacco Co. owns 190 of the 380 shares of preferred and 300 of the 450 shares of common stock of Independent Co. of Porto Rico; also owns 2,150 of the 5,000 shares of capital stock of the Porto Rico Leaf Tobacco Co.)

The American Tobacco Co. is also interested, as indicated, in the following defendants, supply or machinery companies:

Golden Belt Manufacturing Co. (cotton bags). Owns 6,521 of 7,000 shares.

Mengel Box Co. (wooden boxes). British-American Tobacco Co. owns 3,637 of 5,000 shares of stock. (The Mengel Co. owns all of the capital stock of the Columbia Box Co. and of the Tyler Box Co., respectively 1,500 and 250 shares.)

The two foreign corporations were impleaded either because of their nature and character and the operation and effect of contracts or agreements with the American Tobacco Co. or the power which it exerted over their affairs by stock ownership.

As we shall have occasion hereafter in referring to matters beyond dispute to set forth the main facts relied upon by the United States as giving rise to the cause of action alleged against all of the defendants it suffices at this moment to say that the bill averred the origin

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Amsterdam Supply Co. (agency to purchase supplies). Owns majority of stock and controls large part of remainder through subsidiary companies.
Thomas Cusack Co. (bill posting). Owns 1,000 out of 1,500 shares.
Manhattan Briar Pipe Co. Owns all of stock, 3,500 shares.
International Cigar Machinery Co. Of 100,000 shares owns 33,637 shares directly and 29,902 shares through American Cigar Co.—in all 63,539 shares.
The American Tobacco Co. is also interested in the following companies, not named as defendants:
American Machine & Foundry Co. Owns 510 shares directly and remainder (490) through American Cigar Co.
New Jersey Machine Co. Owns 510 shares directly and remainder (490) through American Cigar Co.
Standard Tobacco Stemmer Co. Of 17,300 shares owns 16,895 shares.
Garson Vending Machine Co. Of 500 shares owns 250 shares.
The American Snuff Co., in addition to stock, etc., interests in the American Tobacco Co., American Cigar Co., and the Amsterdam Supply Co., has stock interests in the following defendants:
H. Bolander. Owns all of stock, 1,350 shares.
De Voe Snuff Co. Owns all of stock, 500 shares. (The De Voe Snuff Co. owns all the capital stock, 400 shares, of Skinner & Co., snuff.)
Standard Snuff Co. Owns all of stock, 2,816 shares.
The American Cigar Co., in addition to stock interests in the Amsterdam Supply Co., American Stogie Co., Porto Rican-American Tobacco Co., Kentucky Tobacco Product Co., and International Cigar Machinery Co., has the stock interest indicated in the following defendants:
R. D. Burnett Cigar Co. Owns 77 out of 150 shares.
M. Blaskower Co. Owns 1,875 out of 2,500 shares preferred and 1,875 out of 2,500 shares of common.
Cuban Land & Leaf Tobacco Co. Owns all of stock, 1,000 shares. (The Cuban Land, etc., Co. owns 1,320 of the 1,890 shares of stock of the Vuelta Abajo Steamship Co.)
Cliff Weil Cigar Co. Owns 255 out of 500 shares.
Dusel, Goodloe & Co. Owns 510 out of 750 shares.
Federal Cigar Real Estate Co. Owns all stock, 6,000 shares.
J. J. Goodrum Tobacco Co. Owns 477 out of 600 shares.
Havana-American Co. Owns all stock, 2,500 shares.
Havana Tobacco Co. Owns 700 shares out of 47,038 preferred, 166,800 out of 297,912 common stock, and $3,500,000 of $7,500,000 bonds.
Jordan Gibson & Baum Co. (Inc.). Owns all preferred and common stock, 250 shares each.
Louisiana Tobacco Co. (Ltd.). Owns 375 out of 500 shares.
The J. B. Moos Co. Owns all of stock, 2,000 shares.
J. & B. Moos. Owns all of common stock, 1,000 shares.
Porto Rican Leaf Tobacco Co. Owns 2,500 out of 5,000 shares.
The Smokers' Paradise Corporation. Owns all of common stock, 250 shares, and 349 of 500 shares preferred.
Havana Tobacco Co. has a stock interest in the following corporations:
H. de Cabanis y Carbajal. All of stock, 15,000 shares.
Hy. Clay and Bock & Co. (Ltd.). Owns 9,749 out of 16,950 shares preferred and 14,687 out of 15,990 shares common. (The Hy. Clay, etc., Co. is owner of 16,667 shares of the ordinary capital stock of the Havana Cigar & Tobacco Factories (Ltd.), and also owns 64 shares of the 1,890 shares of the capital stock of the Vuelta Abajo Steamship Co.)
Cuban Tobacco Co. Owns all of stock, 50 shares.
Havana Commercial Co. Owns 55,562 out of 60,000 shares preferred and 124,718 out of 125,000 shares common. (The Havana Commercial Co. owns all of the capital stock, 100 shares, of the M. Valle y Co., cigars.)
Havana Cigar & Tobacco Factories (Ltd.). Owns 6,774 out of 25,000 shares ordinary stock.
J. S. Murias y Co. Owns all of stock, 7,500 shares.
Blackwell's Durham Tobacco Co. In addition to a stock interest in the Amsterdam Supply Co., has the stock interest indicated in the following defendant corporations:
F. P. Penn Tobacco Co. Owns 1,002 out of 1,503 shares.
Scotten-Dillon Co. Owns $10,000 out of $500,000 of stock.
Wells-Whitehead Tobacco Co. Owns all of stock, 1,500 shares.
Conley Foil Co. Owns all of the capital stock, 3,000 shares, of the Johnston Tin Foil & Metal Co.
P. Lorillard Co. Has a stock interest in the American Snuff Co. and the Amsterdam Supply Co.
R. J. Reynolds Tobacco Co. In addition to a stock interest in the Amsterdam Supply Co. and the MacAndrews & Forbes Co., owns one-third of the 5,000 shares of stock of the Lipfert Scales Co.
The British-American Tobacco Co. In addition to a small interest in the Amsterdam Supply Co., has the following stock interest in certain defendants:
David Dunlop (plug). Owns 3,000 of 4,500 shares.
W. S. Mathews & Sons (smoking). Owns 3,637 out of 5,000 shares of stock.
T. C. Williams Co. (plug). Owns all of stock, 4,000 shares.

and nature of the American Tobacco Co. and the origin and nature of all the other defendant corporations, whether accessory or subsidiary, and the connection of the individual defendants with such corporations. In effect the bill charged that the individual defendants and the defendant corporations were engaged in a conspiracy in restraint of interstate and foreign trade in tobacco and the products of tobacco and constituted a combination in restraint of such trade, in violation of the first section of the act, and also were attempting to monopolize and were actually a monopolization of such trade, in violation of the second section. In support of these charges general averments were made in the bill as to the wrongful purpose and intent with which acts were committed which it was alleged brought about the alleged wrongful result.

The prayer of the bill was as follows:

Wherefore petitioner prays:

1. That the contracts, combinations, and conspiracies in restraint of trade and commerce among the States and with foreign nations, together with the attempts to monopolize and the monopolies of the same hereinbefore described be declared illegal and in violation of the act of Congress passed July 2, 1890, and subsequent acts, and that they be prevented and restrained by proper orders of the court.

2. That the agreements, contracts, combinations, and conspiracies entered into by the defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the two written agreements of that date, Exhibits 1 and 2 hereto, be declared illegal, and that injunctions issue restraining and prohibiting defendants from doing anything in pursuance of or in furtherance of the same within the jurisdiction of the United States.

3. That the Imperial Tobacco Co., its officers, agents, and servants be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States until it shall cease to observe or act in pursuance of said agreements, contracts, combinations, and conspiracies entered into by it and other defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the contracts of that date, Exhibits 1 and 2 hereto.

4. That the British-American Tobacco Co. be adjudged an unlawful instrumentality created solely for carrying into effect the objects and purposes of said contract, combination, and conspiracy entered into on or about September 27, 1902, and thereafter, and that it be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States.

5. That the court adjudge the American Tobacco Co., the American Snuff Co., the American Cigar Co., the American Stogie Co., the MacAndrews & Forbes Co., and the Conley Foil Co. is each a combination in restraint of interstate and foreign trade and commerce; and that each has attempted and is attempting to monopolize, is in combination and conspiracy with other persons and corporations to monopolize, and has monopolized part of the trade and commerce among the several States and with foreign nations; and order and decree that each one of them be restrained from engaging in interstate or foreign commerce, or, if the court should be of opinion that the public interests will be better subserved thereby, that receivers be appointed to take possession of all the property, assets, business, and affairs of said defendants and wind up the same, and otherwise take such course in regard thereto as will bring about conditions in trade and commerce among the States and with foreign nations in harmony with law.

6. That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal, and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith.

7. That defendants, each and all, be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or by any other, and be required to desist and withdraw from all connection with the same.

8. That each of the defendants be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured output as a part of interstate and foreign trade and commerce in conjunction or combination with any other defendant, and from taking part or being interested in any agreement or com-

bination intended to destroy competition among them in reference to such purchases or sales.

9. That petitioner have such other, further, and general relief as may be proper.

As to the answers, it suffices to say that all the individual and corporate defendants other than the foreign corporations denied the charges of wrongdoing and illegal combination, and the corporate defendants in particular in addition averred their right under State charters by virtue of which they existed to own and possess the property which they held, and further averred that they were engaged in manufacturing, and that any combination amongst them related only to that subject, and therefore was not within the antitrust act. The two foreign corporations asserted the validity of their corporate organizations and of the assailed agreements, and denied any participation in the alleged wrongful combination.

After the taking of much testimony before a special examiner the case was heard before a court consisting of four judges, constituted under the expediting act of February 11, 1903. In deciding the case in favor of the Government, each of the four judges delivered an opinion. (164 Fed., 700.) A final decree was entered on December 15, 1908. The petition was dismissed as to the English corporations, three of the subsidiary corporations, the United Cigar Stores Co., and all the individual defendants. It was decreed that the defendants other than those against whom the petition was dismissed had theretofore entered into and were parties to combinations in restraint of trade, etc., in violation of the antitrust act, and said defendants and each of them, their officers, agents, etc., were restrained and enjoined "from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combinations, and from continuing as parties thereto." It specifically found that each of the defendants "the American Tobacco Co., American Snuff Co., American Cigar Co., American Stogie Co., and MacAndrews & Forbes Co., constitutes and is itself a combination in violation of the said act of Congress." The corporations thus named, their officers, etc., were next restrained and enjoined "from further directly or indirectly engaging in interstate or foreign trade and commerce in leaf tobacco, or the products manufactured therefrom, or articles necessary or useful in connection therewith. But if any of said last-named defendants can hereafter affirmatively show the restoration of reasonably competitive conditions, such defendant may apply to this court for a modification, suspension, or dissolution of the injunction herein granted against it." The decree then enumerated the various corporations which it was found held or claimed to own some or all of the capital stock of other corporations, and particularly specified such other corporations, and then made the following restraining provisions:

Wherefore each and all of defendants, the American Tobacco Co., the American Snuff Co., the American Cigar Co., P. Lorillard Co., R. J. Reynolds Tobacco Co., Blackwell's Durham Tobacco Co., and Conley Foil Co., their officers, directors, agents, servants, and employees, are hereby restrained and enjoined from acquiring, by conveyance or otherwise, the plant or business of any such corporation wherein any one of them now holds or owns stock; and each and all of said defendant corporations so holding stock in other corporations, as above specified, their officers, directors, agents, servants, and employees, are further

enjoined from voting or attempting to vote said stock at any meeting of the stockholders of the corporation issuing the same and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of such corporation. And it is further ordered and decreed that each and every of the defendant corporations the stock of which is held by any other defendant corporation as hereinbefore shown, their officers, directors, servants, and agents, be and they are hereby respectively and collectively restrained and enjoined from permitting the stock so held to be voted by any other defendant holding or claiming to own the same or by its attorneys or agents at any corporate election for directors or officers and from permitting or suffering any other defendant corporation claiming to own or hold stock therein, or its officers or agents, to exercise any control whatsoever over its corporate acts.

Judgment for costs was given in favor of the petitioner and against the defendants as to whom the petition had not been dismissed, except the R. P. Richardson, Jr., & Co., a corporation, which had consented to the decree. The decree also contained a provision that the defendants or any of them should not be prevented " from the institution, prosecution, or defense of any suit, action, or proceeding to prevent or restrain the infringement of a trade-mark used in interstate commerce or otherwise assert or defend a claim to any property or rights." In the event of a taking of an appeal to this court, the decree provided that the injunction which it directed " shall be suspended during the pendency of such appeal.".

The United States appealed, as did also the various defendants against whom the decree was entered. For the Government it is contended:

1. That the petition should not have been dismissed as to the individual defendants.

2. That it should not have been dismissed as to the two foreign corporations—the Imperial Tobacco Co. and the British-American Tobacco Co. and the domestic corporations controlled by the latter—and that, on the contrary, the decree should have commanded the observance of the antitrust act by the foreign corporations so far as their dealings in the United States were concerned, and should have restrained those companies from doing any act in the United States in violation of the antitrust act, whether or not the right to do said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States.

3. The petition should not have been dismissed as to the United Cigar Stores Co.

4. The final decree should have adjudged defendants parties to unlawful contracts and conspiracies.

5. The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce. More particularly, it is urged, it should have adjudged that the American Tobacco Co., American Snuff Co., American Cigar Co., American Stogie Co., MacAndrews & Forbes Co., the Conley Foil Co., and the British-American Tobacco Co. were severally attempting to monopolize and had monopolized parts of commerce, and that appropriate remedies should have been applied.

6. The decree was not sufficiently specific, since it should have described with more particularity the methods which the defendants had followed in forming and carrying out their unlawful purpose, and should have prohibited the resort to similar methods.

7. The decree should have specified the shares in corporations disclosed by the evidence to be owned by the parties to the conspiracy, and should have enjoined those parties from exercising any control over the corporations in which such stock was held, and the latter, if made defendant, from permitting such control, and should have also enjoined the collecting of any dividends upon the stock.

8. The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspended the injunction pending appeal.

The defendants, by their assignments of errors, complain because the petition was not dismissed as to all, and more specifically (*a*) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (*b*) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (*c*) because the American Tobacco Co., American Snuff Co., American Cigar Co., American Stogie Co., and the MacAndrews & Forbes Co. were adjudged unlawful combinations and restrained from engaging in interstate and foreign commerce.

The elaborate arguments made by both sides at bar present in many forms of statement the conflicting contentions resulting from the nature and character of the suit and the defense thereto, the decree of the lower court, and the propositions assigned as error to which we have just referred. In so far as all or any of these contentions, as many of them in fact do, involve a conflict as to the application and effect of sections 1 and 2 of the antitrust act, their consideration has been greatly simplified by the analysis and review of that act and the construction affixed to the sections in question in the case of Standard Oil Company et al. *v.* United States, quite recently decided. In so far as the contentions relate to the disputed propositions of fact, we think, from the view which we take of the case, they need not be referred to, since in our opinion the case can be disposed of by considering only those facts which are indisputable and by applying to the inferences properly deducible from such facts the meaning and effect of the law as expounded in accordance with the previous decisions of this court.

We shall divide our investigation of the case into three subjects: First, the undisputed facts; second, the meaning of the antitrust law and its application as correctly construed to the ultimate conclusions of fact deducible from the proof; third, the remedies to be applied.

UNDISPUTED FACTS.

The matters to be considered under this heading, we think, can best be made clear by stating the merest outline of the condition of the tobacco industry prior to what is asserted to have been the initial movement in the combination which the suit assails, and in the light so afforded to briefly recite the history of the assailed acts and contracts. We shall divide the subject into two periods, (*a*) the one from the time of the organization of the first or old American To-

bacco Co., in 1890, to the organization of the Continental Tobacco Co., and (*b*) from the date of such organization to the filing of the bill in this case.

Summarizing in the broadest way the conditions which obtained prior to 1890, as to the production, manufacture, and distribution of tobacco, the following general facts are adequate to portray the situation:

Tobacco was grown in many sections of the country having diversity of soil and climate, and therefore was subject to various vicissitudes resulting from the places of production, and consequently varied in quality. The great diversity of use to which tobacco was applied in manufacturing caused it to be that there was a demand for all the various qualities. The demand for all qualities was not local, but widespread, extending as well to domestic as to foreign trade, and therefore all the products were marketed under competitive conditions of a peculiarly advantageous nature. The manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a large number, perhaps, of the manufacturers being in the vicinage of production and others being advantageously situated in or near the principal markets of distribution.

Before January, 1890, five distinct concerns—Allen & Ginter, with factory at Richmond, Va.; W. Duke, Sons & Co., with factories at Durham, N. C., and New York City; Kinney Tobacco Co., with factory at New York City; W. S. Kimball & Co., with factory at Rochester, N. Y.; Goodwin & Co., with factory at Brooklyn, N. Y.—manufactured, distributed, and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 8 per cent of the smoking tobacco produced in the United States. There is no doubt that these factories were competitors in the purchase of the raw product which they manufactured and in the distribution and sale of the manufactured products. Indeed, it is shown that prior to 1890 not only had normal and ordinary competition existed between the factories in question, but that the competition had been fierce and abnormal. In January, 1890, having agreed upon a capital stock of $25,000,000, all to be divided amongst them, and who should be directors, the concerns referred to organized the American Tobacco Co. in New Jersey "for trading and manufacturing," with broad powers, and conveyed to it the assets and businesses, including good will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all. The $25,000,000 of stock of the tobacco company was allotted to the charter members as follows: Allen & Ginter, $3,000,000 preferred, $4.500,000 common; W. Duke, Sons & Co., $3.000,000 preferred, $4.500,000 common; Kinney Tobacco Co., $2,000,000 preferred, $3.000,000 common; W. S. Kimball & Co., $1,000,000 preferred, $1,500,000 common; and Goodwin & Co., $1,000,000 preferred, $1.500,000 common.

There is a charge that the valuation at which the respective properties were capitalized in the new corporation was enormously in excess of their actual value. We, however, put that subject aside, since we propose only to deal with facts which are not in controversy.

Shortly after the formation of the new corporation the Goodwin & Co. factory was closed, and the directors ordered "that the manufacture of all-tobacco cigarettes be concentrated at Richmond." The new corporation, in 1890, the first year of its operation, manufactured about 2,500,000,000 cigarettes, that is about 96 or 97 per cent of the total domestic output, and about 5,500,000 pounds of smoking tobacco out of a total domestic product of nearly 70,000,000 pounds.

In a little over a year after the organization of the company it increased its capital stock by $10,000,000. The purpose of this increase is inferable from the considerations which we now state.

There was a firm known as Pfingst, Doerhoefer & Co., consisting of a number of partners, who had been long and successfully carrying on the business of manufacturing plug tobacco in Louisville, Ky., and distributing it through the channels of interstate commerce. In January, 1891, this firm was converted into a corporation known as the National Tobacco Works, having a capital stock of $400,000, all of which was issued to the partners. Almost immediately thereafter, in the month of February, the American Tobacco Co. became the purchaser of all the capital stock of the new corporation, paying $600,000 cash and $1,200,000 in stock of the American Tobacco Co. The members of the previously existing firm bound themselves by contract with the American Tobacco Co. to enter its service and manage the business and property sold, and each further agreed that for 10 years he would not engage in carrying on, directly or indirectly, or permit or suffer the use of his name in connection with the carrying on of the tobacco business in any form.

In April following the American Tobacco Co. bought out the business of Philip Whitlock, of Richmond, Va., who was engaged in the manufacture of cheroots and cigars, and with the exclusive right to use the name of Whitlock. The consideration for this purchase was $300,000, and Whitlock agreed to become an employee of the American Tobacco Co. for a number of years and not to engage for 20 years in the tobacco business.

In the month of April the American Tobacco Co. also acquired the business of Marburg Bros., a well-known firm located at Baltimore, Md., and engaged in the manufacture and distribution of tobacco, principally smoking and snuff. The consideration was a cash payment of $164,637.65 and stock to the amount of $3,075,000. The members of the firm also conveyed the right to the use of the firm name and agreed not to engage in the tobacco business for a lengthy period.

Again, in the same month, the American Tobacco Co. bought out a tobacco firm of old standing, also located in Baltimore, as G. W. Gail & Ax, engaged principally in manufacturing and selling smoking tobacco, buying with the business the exclusive right to use the name of the firm or the partners, and the members of the firm agreed not to engage in the tobacco business for a specified period. The consideration for this purchase was $77,582.66 in cash and stock to the amount of $1,760,000. The plant was abandoned soon after.

The result of these purchases was manifested at once in the product of the company for the year 1891, as will appear from a note in the

margin.[1] It will be seen that as to cheroots, smoking tobacco, fine-cut tobacco, snuff, and plug tobacco, the company had become a factor in all branches of the tobacco industry.

Referring to the occurrences of the year 1891 as in all respects typical of the occurrences which took place in all the other years of the first period, that is, during the years 1892, 1893, 1894, 1895, 1896, 1897, and 1898, we content ourselves with saying that it is undisputed that between February, 1891, and October, 1898, including the purchases which we have specifically referred to, the American Tobacco Co. acquired 15 going tobacco concerns doing business in the States of Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, and Virginia. For 10 of the plants an all-cash consideration of $6,410.235.26 was paid, while the payments for the remaining 5 aggregated in cash $1,115,100.95 and in stock $4,123,000. It is worth noting that the last purchase, in October, 1898, was of the Drummond Tobacco Co., a Missouri corporation dealing principally in plug, for which a cash consideration was paid of $3,457,500.

The corporations which were combined for the purpose of forming the American Tobacco Co. produced a very small portion of plug tobacco. That an increase in this direction was contemplated is manifested by the almost immediate increase of the stock and its use for the purpose of acquiring, as we have indicated, in 1891 and 1892, the ownership and control of concerns manufacturing plug tobacco and the consequent increase in that branch of production. There is no dispute that as early as 1893 the president of the American Tobacco Co., by authority of the corporation, approached leading manufacturers of plug tobacco and sought to bring about a combination of the plug-tobacco interests, and upon the failure to accomplish this ruinous competition by lowering the price of plug below its cost ensued. As a result of this warfare, which continued until 1898, the American Tobacco Co. sustained severe losses aggregating more than $4,000,000. The warfare produced its natural result, not only because the company acquired during the last two years of the campaign, as we have stated, control of important plug-tobacco concerns, but others engaged in that industry came to terms. We say this, because in 1898, in connection with several leading plug manufacturers, the American Tobacco Co. organized a New Jersey corporation styled the Continental Tobacco Co., for "trading and manufacturing," with a capital of $75,000.000, afterwards increased to $100,000,000. The new company issued its stock and took transfers to the plants, assets, and

[1] The output of the American Tobacco Co. for 1891 was:

	Number.	Pounds.
Cigarettes	2,788,778,000	
Cheroots and little cigars	40,009,000	
Smoking		13,813,355
Fine cut		560,633
Snuff		383,162
Plug		4,442,774
Total output for the United States, 1891:		
Cigarettes	3,137,318,596	
Smoking		76,708,300
Fine cut		16,968,870
Plug and twist		166,177,915
Snuff		10,674,241

businesses of five large and successful competing plug manufacturers.[1]

The American Tobacco Co. also conveyed to this corporation, at large valuations, the assets, brands, real estate, and good will pertaining to its plug-tobacco business, including the National Tobacco Works, the James G. Butler Tobacco Co., Drummond Tobacco Co., and Brown Tobacco Co., receiving as consideration $30,274,200 of stock (one-half common and one-half preferred), $300,000 cash, and an additional sum for losses sustained in the plug business during 1898, $840,035. Mr. Duke, the president of the American Tobacco Co., also became president of the Continental Co.

Under the preliminary agreement which was made, looking to the formation of the Continental Tobacco Co., that company acquired from the holders all the $3,000,000 of the common stock of the P. Lorillard Co. in exchange for $6,000,000 of its stock, and $1,581,300 of the $2,000,000 preferred in exchange for notes aggregating a sum considerably larger. The Lorillard Co., however, although it thus passed practically under the control of the American Tobacco Co. by virtue of its ownership of stock in the Continental Co., was not liquidated, but its business continued to be conducted as a distinct corporation, its goods being marked and put upon the market, just as if they were the manufacture of an independent concern.

Following the organization of the Continental Tobacco Co., the American Tobacco Co. increased its capital stock from $35,000,000 to $70,000,000 and declared a stock dividend of 100 per cent on its common stock, that is, a stock dividend of $21,000,000.

As the facts just stated bring us to the end of the first period which at the outset we stated it was our purpose to review, it is well briefly to point out the increase in the power and control of the American Tobacco Co. and the extension of its activities to all forms of tobacco products which had been accomplished just prior to the organization of the Continental Tobacco Co. Nothing could show it more clearly than the following: At the end of the time the company was manufacturing 86 per cent or thereabouts of all the cigarettes produced in the United States, above 26 per cent of all the smoking tobacco, more than 22 per cent of all plug tobacco, 51 per cent of all little cigars, 6 per cent each of all snuff and fine-cut tobacco, and over 2 per cent of all cigars and cheroots.

A brief reference to the occurrences of the second period, that is, from and after the organization of the Continental Tobacco Co. up to the time of the bringing of this suit, will serve to make evident that the transactions in their essence had all the characteristics of the occurrences of the first period.

In the year 1899 and thereafter either the American or Continental Co., for cash or stock, at an aggregate cost of $50,000,000, bought and closed up some 30 competing corporations and partnerships

[1] P. J. Sorg Co., having factory at Middletown, Ohio, who received preferred stock $4,350,000, common stock $4,525,000, and cash $224,375.
John Finzer & Bros., having factory at Louisville, Ky., who received preferred stock $2,250,000, common stock $3,050,000, and cash $550,000.
Daniel Scotten & Co., having factory at Detroit, Mich., who received preferred stock $1,911,100 and common stock $3,012,500.
P. H. Mayo & Bros., having factory at Richmond, Va., who received preferred stock $1,250,000, common stock $1,925,000, and cash $66,125.
John Wright Co., having factory at Richmond, Va., who received preferred stock $495,000, common stock $495,000, and cash $4,116.67.

theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributors of tobacco and related commodities, the interested parties covenanting not to engage in the business. Likewise the two corporations acquired for cash, by issuing stock, and otherwise, control of many competing corporations, now going concerns, with plants in various States, Cuba and Porto Rico, which manufactured, bought, sold, and distributed tobacco products or related articles throughout the United States and foreign countries, and took from the parties in interest covenants not to engage in the tobacco business.

The plants thus acquired were operated until the merger in 1904, to which we shall hereafter refer, as a part of the general system of the American and Continental Cos. The power resulting from and the purpose contemplated in making these acquisitions by the companies just referred to, however, may not be measured by considering alone the business of the company directly acquired, since some of those companies were made the vehicles as representing the American or Continental Co. for acquiring and holding the stock of other and competing companies, thus amplifying the power resulting from the acquisitions directly made by the American or Continental Co., without ostensibly doing so. It is, besides, undisputed that in many instances the acquired corporations with the subsidiary companies over which they had control through stock ownership were carried on ostensibly as independent concerns disconnected from either the American or the Continental Co., although they were controlled and owned by one or the other of these companies. Without going into details on these subjects, for the sake of brevity, we append in the margin a statement of the corporations thus acquired, with the mention of the competing concerns which such corporations acquired.[1]

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[1] Monopol Tobacco Works (New York, N. Y.). Capital, $40,000; cigarettes and smoking tobacco. In 1899 the American Tobacco Co. acquired all the shares for $250,000, and it is now a selling agency.

Luhrman & Wilbern Tobacco Co. (Middletown, Ohio). Capital, $900,000; scrap tobacco. This business was formerly carried on by a partnership.

Mengel Box Co. (Louisville, Ky.). Capital, $2,000,000; boxes for packing tobacco. This company has acquired the stock ($150,000) of Columbia Box Co. and of Tyler Box Co. ($25,000), both at St. Louis.

The Porto Rican-American Tobacco Co. (Porto Rico). Capital, $1,799,600. In 1899 the American Co. caused the organization of the Porto Rican-American Tobacco Co., which took over the partnership business of Rucabado y Portela, manufacturer of cigars and cigarettes, with covenants not to compete. The American Tobacco Co. and American Cigar Co. each hold $585,300 of the stock; the balance is in the hands of individuals.

Kentucky Tobacco Product Co. (Louisville, Ky.). Capital, $1,000,000. In 1899 the Continental Co. acquired control of the Louisville Spirit-Cured Tobacco Co., engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Co. was organized in New Jersey, with $1,000,000 capital, $450,000 issued to the old stockholders and $550,000 to Continental Co., as consideration for agreement to supply stems.

Golden Belt Manufacturing Co. (North Carolina). Capital, $700,000; cotton bags and containers. In 1899 the American Tobacco Co. acquired the business of this corporation, which was formed to take over a going business.

The Conley Foil Co. (New York). Capital, $825,000; tinfoil combination. In December, 1899, the American Tobacco Co. secured control of the business of John Conley & Son (partnership), New York, N. Y., manufacturers of tinfoil, an essential for packing tobacco products. By agreement the Conley Foil Co. was incorporated in New Jersey "for trading and manufacturing," etc., with $250,000 capital (afterwards $375,000 and $825,000), which took over the firm's business and assets, etc., and the American Tobacco Co. became owner of the majority shares. The Conley Foil Co. has acquired all the stock of the Johnson Tinfoil & Metal Co.—a defendant—of St. Louis, a leading competitor, and they supply under fixed contracts the tinfoil used by defendants.

R. J. Reynolds Tobacco Co. (Winston Salem, N. C.). In 1899 the Continental Tobacco Co. acquired control of the R. J. Reynolds Tobacco Co., one of the largest manufacturers of plug—output in 1898, 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at $5,000,000 (afterwards $7,525,000), which took over the business and assets of the old one. The Continental Co. immediately acquired the majority shares and the American Co. now holds $5,000,000 of stock. The separate organization has been preserved.

It is of the utmost importance to observe that the acquisitions made by the subsidiary corporations in some cases likewise show the remarkable fact stated above; that is, the disbursement of enormous amounts of money to acquire plants, which on being purchased were not utilized but were immediately closed. It is also to be remarked, that the facts stated in the memorandum in the margin show on their face a singular identity between the conceptions which governed the transactions of this latter period with those which evidently existed at the very birth of the original organization of the American Tobacco Co., as exemplified by the transactions in the first period. A statement of particular transactions outside of those previously referred to as having occurred during the period in question will serve additionally to make the situation clear. And to accomplish this purpose we shall, as briefly as may be consistent with clarity, separately refer to the facts concerning the organization during the second period of the five corporations which were named as defendants in the bill, as heretofore stated and which for the purpose of designation we have hitherto classified as accessory defendants, such corporations being the American Snuff Co., American Cigar Co., American Stogie Co., MacAndrews & Forbes Co. (licorice), and Conley Foil Co.

(1) *The American Snuff Co.*—As we have seen, the American Tobacco Co. at the commencement of the first period produced a very small quantity of snuff. Its capacity, however, in that regard was augmented owing particularly to the formation of the Continental Tobacco Co. and the acquisition of the Lorillard Co., by which it came to be a serious factor as a snuff producer. There shortly ensued an aggressive competition in the snuff business between the American Tobacco Co., with the force acquired from the vantage ground resulting from the dominancy of its expanded organization, and others in the trade operating independently of that organization. The result was identical with that which had previously arisen from like conditions in the past.

There was acquired in the name of the new Reynolds Co., with covenants against competition, the following plants:

In 1900, T. L. Vaughn & Co., partnership, of Winston, N. C.; consideration, $90,506; Brown Bros. Co., a North Carolina corporation, Winston, N. C.; consideration, $67,615; and P. H. Hanes & Co. and B. F. Hanes & Co., Winston, N. C., partnership; consideration, $671,950.

In 1905, Rucker & Witten Tobacco Co., Martinsville, Va.; consideration, $512,898.

In 1906, D. H. Spencer & Co., Martinsville, Va.; consideration, $314,255.

(All of the foregoing plants were closed as soon as purchased.)

A majority of the $400,000 capital stock in the Lipfert-Scales Co., of Winston, N. C., a corporation largely engaged in the manufacture of plug tobacco and interstate and foreign commerce in leaf tobacco and its products, was acquired by the Reynolds Co. The separate organization of the Lipfert-Scales Co. is preserved and the business carried on under its corporate name.

The R. J. Reynolds Tobacco Co. also holds $98,300 stock of the MacAndrews & Forbes Co. and $9,600 of the Amsterdam Supply Co.

Blackwell's Durham Tobacco Co. (Durham, N. C.). Capital, $1,000,000. In 1899 the American Tobacco Co. procured for $4,000,000 all the stock of Blackwell's Durham Tobacco Co. at Durham, N. C., manufacturer and distributor of tobacco products. Thereupon the Blackwell's Durham Tobacco Co. of New Jersey, capital, $1,000,000, all owned by the American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved.

The Durham Co. has acquired control of the following competitors: Reynold's Tobacco Co., F. R. Penn Tobacco Co., and Wells-Whitehead Tobacco Co.

The following companies came also under the control of the American Tobacco Co. through acquired stock ownership.

S. Anargyros. Capital, $650,000; Turkish cigarettes. In 1890 the American Tobacco Co. procured the organization of corporation of S. Anargyros, which took over that individual's going business and has since controlled it. Through this company the business in Turkish cigarettes is largely conducted.

The John Bollman Co. (San Francisco). Capital, $200,000; cigarettes. In 1900 the American Tobacco Co. procured organization of the John Bollman Co., which took over the business of the former concern in exchange for stock. Its separate organization has been preserved.

In March, 1900, there was organized in New Jersey a corporation known as the American Snuff Co., with a capital of $25,000,000, one-half preferred and one-half common, which took over the snuff business of the P. Lorillard Co., Continental Tobacco Co., and the American Tobacco Co., with that of a large competitor, viz, the Atlantic Snuff Co. The stock of the new company was thus apportioned: Atlantic Snuff Co., preferred, $7,500,000, common, $25,000,000; P. Lorillard Co., preferred, $1,124,700, common, $3,459,400; the American Tobacco Co., preferred, $1,177,800, common $3,227,500; Continental Tobacco Co., preferred, $197,500, common, $813,100. The stock issued to Continental Tobacco Co. and the defendants, P. Lorillard Co. and the American Tobacco Co., is still held by the latter, and they have at all times had a controlling interest in the snuff company. All the companies, together with their officers and directors, convenanted that they would not thereafter engage as competitors in the tobacco business or the manufacture, sale, or distribution of snuff.

Among the assets transferred by the Atlantic Snuff Co. to American Snuff Co. were all the shares ($600,000) of W. E. Garrett & Sons (Inc.), then and now one of the oldest and very largest producers of snuff, for a long time and still engaged at Yorkland, Del., in interstate and foreign commerce in tobacco and its products, and which controlled through stock ownership the Southern Snuff Co., Memphis, Tenn.; Dental Snuff Co., Lynchburg, Va.; and Stewart-Ralph Snuff Co., Clarksville, Tenn. The separate existence of W. E. Garrett & Sons (Inc.) has been preserved and its business conducted under the corporate name. In March, 1900, the American Snuff Co. acquired all the shares of George W. Helme Co., one of the oldest and largest producers of snuff and actively engaged at Helmetta, N. J., in interstate and foreign commerce in competition with defendants, by issuing in exchange therefor $2,000,000 preferred stock and $1,000,000 common; and it thereafter took a conveyance of all assets of the acquired company and now operates the plant under its own name.

As a result of the transactions just stated, it came to pass that the American Tobacco Co., which had at the end of the first period only a very small percentage of the snuff-manufacturing business, came virtually to have the dominant control as a manufacturer of that product.

(2) *Conley Foil Co., manufacturers of tinfoil, an essential for packing tobacco products.*—In December, 1899, the American Tobacco Co. secured control of the business of John Conley & Sons, a partnership, of New York City. By agreement the Conley Foil Co. was incorporated in New York "for trading and manufacturing," etc., with $250,000 capital, ultimately increased to $825,000. The corporation took over the business and assets of the firm, and the American Tobacco Co. became owner of a majority of the shares of stock. The Conley Foil Co. has acquired all the shares of stock of the Johnson Tinfoil & Metal Co., of St. Louis, a leading competitor, and they supply, under fixed contracts at remunerative prices, the tinfoil used by the defendants, which constitutes the major part of the total production in the United States.

(3) *American Cigar Co.*—Prior to 1901 the American and Continental Tobacco Cos. manufactured, sold, and distributed cigars,

stogies, and cheroots. In the year stated the companies determined to engage in the business upon a larger scale. Under agreement with Powell, Smith & Co., large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Co., "for trading and manufacturing," etc., to which all three conveyed their said business, and it has since carried on the same. The American and Continental Cos. each acquired 46½ per cent of the shares and Powell, Smith & Co. 7 per cent; the original capitalization was $10,000,000 (afterwards $20,000,000), and more than three-fourths is owned by the former. The cigar company acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking from the parties covenants against engaging in the tobacco business; and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers, and distributors in the United States, Cuba, and Porto Rico. It manufactures, sells, and distributes a considerable percentage of domestic cigars; is the dominating factor in the tobacco business, foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. It also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey, and Tennessee.

(4) *The MacAndrews & Forbes Co., manufacturers of licorice.*—There is no question that licorice paste is an essential ingredient in the manufacture of plug tobacco, and that one who is debarred from obtaining such paste would therefore be unable to engage in or carry on the manufacture of such product. The control over this article was thus secured: In May, 1902, the Continental Co. secured control of MacAndrews & Forbes Co., of Newark, N. J., and organized "for trading and manufacturing" a corporation known as the MacAndrews & Forbes Co., with a capital of $7,000,000, $4,000,000 preferred and $3,000,000 common, which took over the business of MacAndrews & Forbes and another large competitor. The Continental Co. acquired two-thirds of the common stock by agreeing to purchase its supply of paste from the new company. The American Tobacco Co., at the time of the filing of the bill, was the owner of $2,112,900 of the common stock and $750,000 preferred. By various purchases and agreements the MacAndrews & Forbes Co. acquired, substantially, the business of all competitors. Thus, in June, 1902, it purchased the business of the Stamford Manufacturing Co., of Stamford, Conn., and incorporated the National Licorice Co., which acquired the business of Young & Smylie and F. B. & V. P. Scudder, and the National Co. agreed with MacAndrews & Forbes not to produce licorice for tobacco manufacturers. In 1906 all the stock in the J. S. Young Co.—$1,800,000—which had been organized to take over the business of the J. S. Young Co., of Baltimore, Md., was acquired by the MacAndrews & Forbes Co. The MacAndrews & Forbes Co. use in excess of 95 per cent of the licorice root consumed in the United States.

(5) *American Stogie Co.*—In May, 1903, the American Cigar Co. and the American and Continental Tobacco Cos. caused the American Stogie Co. to be incorporated in New Jersey with $11,979,000 capital, which immediately took over the stogie and tobie business of the companies named in exchange for $8,206,275 stock, and then

in the usual ways acquired the business of others in the manufacture, sale, and distribution of such products, with covenants not to compete. It acquired, in exchange for $3,647,725 stock, all shares of United States Cigar Co. (which had previously acquired and owned the business of important competitors) and subsequently took the conveyance of the plant and assets. The majority shares always have been held by defendant, the American Cigar Co.

As we think the legitimate inferences deducible from the undisputed facts which we have thus stated will be sufficient to dispose of the controversy, we do not deem it necessary to expand this statement so as to cause it to embrace a recital of the undisputed facts concerning the entry of the American Tobacco Co. into the retail tobacco trade through the acquisition of a controlling interest in the stock of what is known as the United Cigar Stores Co., as well as to some other subjects which, for the sake of brevity, we likewise pass over in order to come at once to a statement concerning the foreign companies.

The English companies.—In September, 1901, the American Tobacco Co. purchased, for $5,347,000, a Liverpool (England) corporation, known as Ogden's Limited, there engaged in manufacturing and distributing tobacco products. A trade conflict which at once ensued caused many of the English manufacturers to combine into an incorporation known as the Imperial Tobacco Co. of Great Britain and Ireland, capital £15,000,000, afterwards increased to £18,000,000, sterling. The trade war was continued between this corporation and the American Tobacco Co., with a result substantially identical with that which had hitherto, as we have seen, arisen from such a situation.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies, and Cuba; and that the British-American Tobacco Co., with capital of £6,000,000 apportioned between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement was immediately put into effect and has been observed.

The Imperial Co. holds one-third and the American Co. two-thirds of the capital stock of the British American Tobacco Co. (Ltd.). The latter company maintains a branch office in New York City, and the vice president of the American Tobacco Co. is a principal officer. This company uses large quantities of domestic leaf, partly exported to various plants abroad and about half manufactured here and then exported. By agreement all this is purchased through the American Tobacco Co. In addition to many plants abroad, it has warehouses in various States and plants at Petersburg, Va., and Durham, N. C., where tobacco is manufactured and then exported.

The purchase of necessary leaf tobacco in the United States by the Imperial Co. is now made through a resident general agent and is exported as a part of foreign commerce.

Not to break the continuity of the narrative of facts, we have omitted in the proper chronological order to state the facts relative to what was known as the Consolidated Tobacco Co. We now particularly refer to that subject.

The Consolidated Tobacco Co.—In June, 1901, parties largely interested in the American and Continental Cos. caused the incorporation in New Jersey of the Consolidated Tobacco Co., capital $30,000,000 (afterwards $40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener. J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all the shares of common stock of the old ones. Its business of holding and financing was continued until 1904, when, with the American and Continental Cos., it was merged into the present American Tobacco Co.

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Co., Continental Tobacco Co., and Consolidated Tobacco Co. were merged into one corporation, under the name of the American Tobacco Co., the principal defendant here. The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote).

The powers conferred by the charter are stated in the margin.[1]

Prior to the merger the Consolidated Tobacco Co., a majority of whose $40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener, and Oliver H. Payne, had acquired, as already stated, nearly all common shares of both old American and Continental Cos., and thereby control. The preferred shares, however, were held by many individuals. Through the method of distribution of the stock of the new company, in exchange for shares in the old American and in the Continental Co., it resulted that the same six men in control of the combination through the Consolidated Tobacco Co. continued that control by ownership of stock in the merged or new American Tobacco Co. The assets, property, etc., of the old companies passed to the American Tobacco Co. (merged), which has since carried on the business.

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Co. that company has acquired four large tobacco concerns; that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation, but were at once abandoned. Second, that the new company has, besides, acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled

[1] To buy, manufacture, sell, and otherwise deal in tobacco and the products of tobacco in any and all forms; * * * to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; * * * to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; * * * to conduct business in all other States, Territories, possessions, and dependencies of the United States of America, and in all foreign countries; * * * to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidences of indebtedness created by any other corporation or corporations of this or any other State or Government, and to issue its own obligations in payment or exchange therefor. * * *

by the American Tobacco Co., although the connection as to two of these companies with that corporation was long and persistently denied.

Thus, reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Co. was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Co. exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed relatively over foreign commerce, and the commerce of the whole world in the raw and manufactured products stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider—that is, the construction of the antitrust act and the application of the act as rightly construed to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

THE CONSTRUCTION AND APPLICATION OF THE ANTITRUST ACT.

If the antitrust law is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the antitrust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Co. in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in the Standard Oil Co. case, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside the question would yet remain whether the principal defendant, the American Tobacco Co., and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own property, would be amenable to the prohibitions of the act. Yet, further, even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Co., when stripped of its stock ownership, would be in and of itself within the prohibitions of the act, although that company was organized and

took being before the antitrust act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be in and of themselves either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the Government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested.

Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Co., asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract and combination it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But as thus construing the act by the rule of the letter which kills would necessarily operate to take out of the reach of the act some of the accessory and many subsidiary corporations, the existence of which depend not at all upon combination or agreement or contract, but upon mere purchases of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act, and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute if they are within its spirit, because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties were acquired in view of the letter of the act exclude many of the assailed transactions from condemnation, it is yet urged that giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, because looking at the case as a whole every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods brought into play for the purpose of advancing trade instead of with the object of obstructing and restraining the same. But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the antitrust act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter.

This must be the case unless it be possible in reason to say that for the purpose of including one class of acts which would not otherwise be embraced a literal construction, although in conflict with reason, must be applied, and for the purpose of including other acts which would not otherwise be embraced a reasonable construction must be resorted to. That is to say, two conflicting rules of construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty, however, is now but an abstraction, because it has been removed by the consideration which we have given quite recently to the construction of the antitrust act in the Stanard Oil case. In that case it was held, without departing from any previous decision of the court, that as the statute had not defined the words "restraint of trade," it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions. (Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S., 290, and 171 U. S., 505.) That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic case, as follows (171 U. S., 568): "The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.

In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term "restraint of trade" required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from

destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, reexpress and reaffirm.

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard Oil case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Considering, then, the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly, results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and

illegal combination is overwhelmingly established by the following considerations:

(*a*) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.

(*b*) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued.

(*c*) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed.

(*d*) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

(*e*) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade.

(*f*) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the antitrust act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

In stating summarily, as we have done, the conclusions which, in our opinion, are plainly deducible from the undisputed facts, we have not paused to give the reasons why we consider, after great consideration, that the elaborate arguments advanced to affix a different com-

plexion to the case are wholly devoid of merit. We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject matter of the combination which we find to exist and the combination itself are not within the scope of the antitrust law, because when rightly considered they are merely matters of intrastate commerce, and therefore subject alone to State control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the Standard Oil case, as not to require restatement.

Leading as this does to the conclusion that the assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations viewed independently, including the foreign corporations in so far as by the contracts made by them they became cooperators in the combination—comes within the prohibitions of the first and second sections of the antitrust act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

THE REMEDY.

Our conclusion being that the combination as a whole, involving all its cooperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the antitrust act, it follows that the relief which we are to afford must be wider than that awarded by the lower court, since that court merely decided that certain of the corporate defendants constituted combinations in violation of the first section of the act, because of the fact that they were formed by the union of previously competing concerns and that the other defendants not dismissed from the action were parties to such combinations or promoted their purposes. We hence, in determining the relief proper to be given, may not model our action upon that granted by the court below, but in order to enable us to award relief coterminous with the ultimate redress of the wrongs which we find to exist, we must approach the subject of relief from an original point of view. Such subject necessarily takes a twofold aspect—the character of the permanent relief required and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible under the situation as it now exists to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: (1) The duty of giving complete and efficacious effect to the prohibitions of the statute; (2) the accomplishing of this result with as little injury as possible to the interest of the general public; and (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we

find to have inspired and dominated the combination from the beginning. Mindful of these considerations and to clear the way for their application we say at the outset without stopping to amplify the reasons which lead us to that conclusion, we think that the court below clearly erred in dismissing the individual defendants, the United Cigar Stores Co. and the foreign corporations and their subsidiary corporations.

Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the antitrust law which has been hitherto considered by this court: First, because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof would afford no adequate measure of relief, since different ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy; second, because the methods of apparent ownership by which the wrongful intent was in part carried out and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult if not impossible to formulate a remedy which could restore in their entirety the prior lawful conditions; third, because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief, to tentatively suggest rather than to specifically demand definite and precise remedies; we might at once resort to one or the other of two general remedies—(*a*) the allowance of a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or cooperate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured, a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or (*b*) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the property of the combination or otherwise a condition of things which would not be repugnant to the prohibitions of the act.

But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its cooperating forces produce or control might inflict infinite injury upon the public

by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows:

First. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the antitrust act.

Second. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of re-creating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law.

Third. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed 60 days.

Fourth. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute.

Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

While in many substantial respects our conclusion is in accord with that reached by the court below, and while also the relief which we think should be awarded in some respects is coincident with that which the court granted, in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below to enter a decree in conformity with this opinion and to take such further steps as may be necessary to fully carry out the directions which we have given.

And it is so ordered.

SUPREME COURT OF THE UNITED STATES.

Nos. 118 and 119.—October Term, 1910.

118. The United States of America, appellant, *v.* The American Tobacco Company and others. 119. The American Tobacco Company and others, appellants, *v.* The United States of America.	Appeals from the Circuit Court of the United States for the Southern District of New York.

[May 29, 1911.]

Mr. Justice Harlan concurred in part and dissented in part:

I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Co. and its accessory and subsidiary corporations and companies, including the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the antitrust act of 1890, and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details for the suppression of the evils of the combination in question. But the case is sent back, with *directions* further to hear the parties, by evidence or otherwise, "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, *and* of *re-creating* out of the elements *now* composing it, a new condition" which shall not be repugnant to law. The court, in its opinion, says of the present combination, that its illegal purposes are overwhelmingly established by many facts, among others—

by the ever-present manifestation which is exhibited of a *conscious wrongdoing* by the form in which the various transactions were embodied from the

beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain others, and to monopolize and retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

The court further says of this combination and monopoly:

The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised to monopolize the trade by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.

But it seems that the course I have suggested is not to be pursued. The case is to go back to the circuit court in order that out of the elements of the old combination a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us—as it undoubtedly does—warrants the characterization which the court has made of this monster combination, why can not all necessary directions be now given as to the terms of the decree? In my judgment there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such directions would not only end this litigation, but would serve to protect the public against any more conscious wrongdoing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress.

I will not say what, in my opinion, should be the form of the decree nor speculate as to what the details ought to be. It will be time enough to speak on that subject when we have the decree before us. I will, however, say now that, in my opinion, the decree below should be affirmed as to the tobacco company and its accessory and subsidiary companies and reversed on the cross appeal of the Government.

But my objections have also reference to those parts of the court's opinion reaffirming what it said recently in the Standard Oil case about the former decisions of this court touching the antitrust act. We are again reminded, as we were in the Standard Oil case, of the necessity of applying the "rule of reason" in the construction of this act of Congress—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid *every* restraint of interstate trade, in whatever form, or to whatever extent, but the court has assumed to insert in the act, by construction merely, words which make Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the Standard Oil case was in accordance with our previous decisions in the Trans-Missouri and Joint Traffic cases (166 U. S., 290; 171 U. S., 505), if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time in the Standard Oil case, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression the majority, in the Trans-Missouri and Joint Traffic cases, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say, and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason"; for, it may be assumed, that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious, from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the antitrust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the Standard Oil case. I will not repeat what is therein stated, but it may be well to cite an additional authority. In the Trade-Mark cases (100 U. S., 82), the court was asked to sustain the

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constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said:

> If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.

This language was cited with approval in Employer's Liability cases (207 U. S., 463, 502). I refer to my dissenting opinion in the Standard Oil case as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.

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